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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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| In the Matter of: |) | |
| |) | |
| 800 Data Base Access Tariffs and the |) | CC Docket No. 93-129 |
| |) | |
| 800 Service Service Management System |) | |
| Tariff |) | |
| |) | |
| and |) | |
| |) | |
| Provision of 800 Services |) | CC Docket No. 86-10 |

MCI COMMENTS

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its comments on the refund schedules filed by the LECs on May 14, 1997, in the above-captioned docket. In the Order on Reconsideration (Order), the Commission requires the LECs to file a schedule of proposed refunds and refund plan consistent with the Order and the 800 Data Base Tariff Order.¹ The refund plans are deficient in important respects and should not be approved without considerable modification. The Commission should require the

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¹In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, Report and Order, CC Docket No. 93-129, released October 28, 1996 (800 Data Base Tariff Order).

LECs to refile their refund plans and allow for interested parties to comment on these revised refund plans.

II. The Full Amount of the Disallowance Should Be Refunded

In its petition for reconsideration in the above-captioned docket, MCI showed that the Commission should require the refund to be effected through a one-time PCI adjustment reflecting the full amount of the excess exogenous costs included in LEC PCIs during the three and a half years the tariffs were subject to the accounting order.² Because the Commission has determined that the LECs' traffic sensitive PCIs included \$34.1 million in excess exogenous costs, it should require the LECs to make a one-time exogenous cost change of \$119.4 million plus interest.

In their refund plans, the LECs have generally claimed some form of "headroom offset" against the disallowance required by the Commission. However, to focus on the rates that were in effect in determining overcharges is inconsistent with the principles of the Commission's price cap regime. Under price cap regulation, the only relevant parameters are the price cap index and band limits. Consistent with the principle that the Commission does not regulate rates directly, the 800 Data Base Tariff Order did not find any particular rate to be unlawful. Instead, it found the LECs tariffs unlawful to the extent that the PCIs included excess exogenous costs. Price cap principles thus require

²MCI Petition at 2.

that refunds be based on the excess costs in the LECs' PCIs during the period the accounting order was in effect.

Further, the Commission has never permitted PCI reductions to be offset by headroom amounts from prior periods. For example, when PCIs are adjusted upwards as part of a low-end adjustment, the full amount of the PCI change must be reversed at the end of the tariff year.³ No credit is granted for the LEC's decision to price below cap. Similarly, when the LECs removed OPEB costs from their PCIs, the exogenous cost reduction equalled the original exogenous cost increase.⁴ No credit was granted for the LECs' decision to price below cap in the intervening years. Accordingly, the LECs should be required to refund the full amount of the excess exogenous costs included in their PCIs.

III. If the 93-193 Methodology Is Used, LECs Should Be Required to Follow it in Full

Several LECs reference the refund calculation instructions in the Refund Order as the basis for their refund plans.⁵ None of the LECs, however, has followed the Refund Order's instructions in full. Instead, the LECs have developed their own variants

³In the Matter of Commission Requirements for Cost Support Material to be Filed with 1993 Annual Access Tariffs, Order, 8 FCC Rcd 1936, 1938 (1993).

⁴In the Matter of Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket 94-1, April 7, 1995, at ¶309.

⁵In the Matter of 1993 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, released April 17, 1997 (Refund Order).

of the Refund Order's methodology, picking and choosing elements of this methodology whenever it is in their interest to do so. Not surprisingly, all of the LECs' deviations from the Refund Order's methodology have the effect of reducing the calculated refund liability.

The LECs have deviated from the Refund Order in three important ways. First, several LECs have claimed a sharing offset, arguing that they have already provided part of their refund liability to customers in the form of sharing. Second, all of the LECs have failed to take the band limits into account, thereby overstating the amount of headroom available to offset their refund liability. Third, several LECs have based their "headroom offset" not on actual headroom but on a weighted average of headroom for the tariff year as a whole.

The modifications to the Refund Order's methodology violate the Communications Act or the Commission's price cap rules. Accordingly, the Commission should require the LECs to modify their refund plans to bring them into compliance with the price cap rules and the Communications Act. Requiring the LECs to adopt the Refund Order's methodology in full would ensure compliance with the price cap rules and Communications Act, and would also ensure consistency among the refund plans.

A. The Commission Should Not Allow Sharing Offsets

Five LECs -- Bell Atlantic, NYNEX, SWBT, Pacific Bell, and US West -- seek to reduce their refund liability through a "sharing offset." They argue that they have

already refunded part of their overcharges through the sharing mechanism. NYNEX, for example, contends that “had the disallowance been effective in 1993, the rates and revenues would have been lower, resulting in a lower rate of return and a lower sharing obligation than was actually incurred for calendar year 1993.”⁶

The Commission did not permit sharing offsets in the Refund Order, and should not permit them here. There is a clear distinction between refunds and sharing. Refunds are ordered by the Commission pursuant to Section 204(a), and reflect actual overcharges paid by customers for one or several rate elements. Sharing, on the other hand, derives from the Commission’s Section 205(a) authority, and is based on overall earnings. They are completely separate mechanisms; a sharing obligation can arise regardless of whether a customer has been overcharged. Because sharing is based on overall earnings, and there is therefore no direct link between the inflated traffic sensitive PCIs and the LECs’ sharing obligation, there is no basis for using part of this sharing obligation to offset a refund amount.

B. The LECs Have Failed To Take SBI Upper Limits Into Account In Calculating Headroom

In the Refund Order, the Commission outlines a methodology for computing refunds.⁷ This methodology requires the LECs to recalculate their past PCIs, SBI upper limits, and maximum CCL rates. First, the LECs must recalculate past PCIs to correct

⁶NYNEX Refund Plan at 4.

⁷Refund Order at ¶¶97-106.

for rule violations. Then, the LECs must make corresponding adjustments to the service category and subcategory SBI upper limits. If any subcategory SBI that was in effect exceeds the recalculated upper limit, then the LECs are required to reduce the subcategory SBI to its upper limit. The LECs are then required to repeat this step for the service category SBI.

The Commission then concludes that LECs overcharged customers to the extent that 1) any API, adjusted to incorporate changes to the service category SBIs, exceeds the corrected PCI; or 2) any adjusted service category SBI exceeds its recalculated upper limit; or 3) any subcategory SBI exceeds its recalculated upper limit. The LECs are directed to make refunds in the amount of any above-cap or above-band revenue, plus interest.

Because the Commission's methodology requires a refund only when the rate in effect exceeds the corrected cap, it allows a form of headroom offset. The amount of available headroom is limited, as required by the price cap rules, by the service category and subcategory SBI upper limits, as well as the PCI. Without exception, however, none of the LECs has taken the effects of the SBI upper limits into account when calculating their headroom offsets. This has had the effect of overstating their headroom offset. It is possible, for example, that an SBI that was in effect exceeded its corrected SBI upper limit even when there was sufficient headroom in the basket as a whole to offset the disallowance.

The Commission should reject the LECs' proposed methodology as inconsistent with the price cap rules. The Commission's price cap rules limit LEC pricing with a

system of “baskets and bands.” The objectives for the service bands are to permit incremental changes in prices without subjecting ratepayers to precipitous changes in the prices for LEC services and without enabling LECs to disadvantage one class of ratepayers to the benefit of another class.⁸ To permit the LECs to ignore the effects of the bands in calculating their refund liability would defeat these objectives. The Commission should require the LECs to follow the methodology in the Refund Order and take the effects of band limits into account when calculating available headroom.

C. Headroom Offsets May Not Be Based on a Weighted Average

The Access Tariff Refund Order requires the LECs to compute overcharges by comparing the rates in effect to the corrected caps on July 1 and January 1 of each year.⁹ If the API exceeds the applicable PCI, or an SBI exceeds the applicable upper limit, then the LEC is deemed to have overcharged its customers.¹⁰ Several LECs have calculated their refunds on this basis, albeit using the more exact approach of comparing rates to the applicable corrected cap associated with each tariff filing, not only at six month intervals.¹¹

⁸In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, released October 4, 1990, at ¶198.

⁹Refund Order at ¶¶97-103.

¹⁰Refund Order at ¶104.

¹¹See, e.g., Ameritech Refund Plan; SNET Refund Plan.

However, NYNEX, SWBT, and Bell Atlantic have used a very different approach to calculating their "headroom offset." Instead of comparing rates to caps on July 1 and January 1, or at some other reasonable point in time, such as at each tariff filing, they have calculated a headroom offset figure for the tariff year as a whole. This annual headroom offset is computed by calculating the headroom available after each tariff filing, pro-rated for the number of days the tariff was in effect, and then calculating the total.

The use of this methodology yields a very different result from the Commission's methodology. Using this methodology, LECs would refund overcharges only if the total annual headroom amount is less than the amount of the disallowance. For example, in 1995 NYNEX does not show a refund liability because the total headroom, \$6,124,553, exceeds the \$1,597,885 disallowance ordered by the Commission. Under the Commission's methodology, however, NYNEX would have incurred a refund liability for 1995. According to NYNEX's Exhibit B, NYNEX was pricing at the original cap for 153 days in 1995, and therefore clearly pricing above the PCI adjusted for the disallowance of exogenous costs.

The Commission should reject the use of an annual headroom offset because it would permit the LECs to offset above-cap pricing in one part of the tariff year with headroom from other parts of the tariff year. In the example cited above, for example, NYNEX avoids paying a refund for the period it priced above the corrected cap because it priced well below cap during the rest of the tariff year. However, under the principles of price cap regulation embodied in the Refund Order's methodology, all that matters in

determining if customers have been overcharged is whether the LEC priced above the corrected cap at any time. There is no equivalent to the rate of return "monitoring period" over which rates less than the maximum in one period can be offset against rates greater than the maximum in another period. Price cap rules prevent LECs from carrying forward any unused headroom. Most importantly, offsetting overcharges with below-maximum rates from other periods would constitute prohibited retroactive ratemaking.

IV. Conclusion

MCI recommends that the Commission require the LECs to recalculate their refund plans to reflect the full amount of the disallowance, plus interest. Alternatively, the Commission should require the LECs to follow the Access Tariff Refund Order's refund methodology and correct their filings by 1) taking band limits into account, 2) using actual cap and band limits, not a weighted average of headroom, and 3) refunding the full amount of overcharges without any "sharing offsets."

Respectfully submitted,
MCI TELECOMMUNICATIONS
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June 3, 1997

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on June 3, 1997.



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CERTIFICATE OF SERVICE

I, Barbara Nowlin, do hereby certify that copies of the foregoing Comments were sent via first class mail, postage paid, to the following on this 3rd day of June, 1997.

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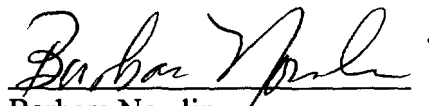
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